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No. 71-366

In the Supreme Court of the United States

OCTOBER TERM, 1971

TIDEWATER OIL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND PHILLIPS PETROLEUM COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported. The order and certification of the district court (Pet. App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1971. The petition for a writ of certiorari was filed on September 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Technically, Section 1254(1) appears inapplicable here. Because leave to appeal was denied below, this case was never "in

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QUESTION PRESENTED

Whether the Expediting Act precludes a court of appeals in a civil antitrust action brought by the United States from entertaining an interlocutory appeal certified pursuant to the Interlocutory Appeals Act, 28 U.S.C. 1292(b).

STATUTE INVOLVED

Section 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U.S.C. 29, provides:

> In every civil action brought in any district court of the United States under any of said [antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

The Interlocutory Appeals Act, 62 Stat. 929, as amended in 1958, 72 Stat. 1770, 28 U.S.C. 1292(b), provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for

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the court of appeals" within the meaning of Section 1254. See *House* v. *Mayo*, 324 U.S. 42, 44 (*per curiam*), construing the predecessor of 28 U.S.C. 1254(1); 7B, Moore, *Federal Practice*, Section 1254 (2d ed., 1970). The Court, however, may issue a common law writ of certiorari under the All Writs Statute, 28 U.S.C. 1651(a). *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, 201–203; *In the Matter of 620 Church Street Building Corp.*, 299 U.S. 24, 26.

> difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

STATEMENT

In July 1966, the United States filed a civil antitrust suit alleging that the acquisition by Phillips Petroleum Company ("Phillips") of certain assets and operations of petitioner Tidewater Oil Company ("Tidewater") violated Section 7 of the Clayton Act, 15 U.S.C. 18. At the same time, the government filed motions for a temporary restraining order and a preliminary injunction to enjoin consummation of the acquisition. The next day, the district court denied a temporary restraining order and Tidewater transferred title to its Western Marketing and Manufacturing Division to Phillips (Pet. App. C, pp. 4–7). In November 1966, the district court denied the motion for a preliminary injunction, which sought either rescission of the transaction or maintenance by Phillips of the going concern value of the transferred assets and operations (Pet. App. C).

Tidewater continued as a party during the ensuing five years of pretrial discovery and preparation.[2] In April 1971, following the government's announcement that it had completed discovery and was prepared for trial, Tidewater moved for its dismissal as a party (Pet. App. D). The district court denied the motion (Pet. App. B), but included in its order a certification for interlocutory appeal.

The Court of Appeals for the Ninth Circuit denied *per curiam* Tidewater's petition for leave to appeal under Section 1292(b), relying upon its earlier decision in *United States* v. *FMC Corporation,* 321 F. 2d 534 (C.A. 9).

ARGUMENT

1. This Court refused to review the question raised here—the jurisdiction of a court of appeals to consider an interlocutory appeal under 28 U.S.C. 1292(b) in a government civil antitrust suit—in the 1968 Term. In *Farbenfabriken Bayer, A.G.* v. *United States,* 1968 Trade Cases ¶ 72,570 (C.A.D.C.), certiorari denied, 393 U.S. 959, petitioner Bayer moved in the district court for dismissal of a civil antitrust suit brought against it by the government. As here, the district court denied the motion but certified the question for interlocutory appeal pursuant to Section 1292(b).[3] The court of appeals, however, de-

[2] Tidewater merged with the Getty Oil Company on September 30, 1967. Tidewater has never contended that that merger altered Tidewater's legal status as a party defendant in the present case.

[3] See *United States* v. *Farbenfabriken Bayer, A.G. and Chemagro Corp.*, 1968 Trade Cases ¶ 72,569 (D.D.C.), decided May 14, 1968.

nied the resultant application for an interlocutory appeal.

Bayer then petitioned this Court for a writ of certiorari,[4] asserting, as does Tidewater here, that the Expediting Act was not intended and does not operate to preclude interlocutory appeals certified under Section 1292(b). See Petition for a Writ of Certiorari, No. 505, October Term, 1968. This Court denied certiorari. 393 U.S. 959.

The same reasons that resulted in the denial of certiorari in *Bayer* apply here, and call for the same result.

2. The decision below is correct. This Court has consistently ruled that Section 2 of the Expediting Act precludes interlocutory appeals in government civil antitrust cases, since it permits appeals in such cases to be taken only from "final judgments" of the district court. As Mr. Justice Brandeis explained in the first decision announcing the rule, *United States* v. *California Cooperative Canneries,* 279 U.S. 553, 558:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an

[4] Concurrently, Bayer filed a jurisdictional statement (No. 504, October Term, 1968) and various motions for leave to file petitions for writs of certiorari pursuant to the All Writs Statute, 28 U.S.C. 1651 (838 Misc. and 839 Misc., October Term, 1968). Bayer's appeal was ultimately dismissed, 393 U.S. 216, and its motions denied, 393 U.S. 958.

> appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U.S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree. * * *

See also, *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142; *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, 201–202; *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217; *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 304–305. Cf. *United States* v. *FMC Corporation*, 84 S. Ct. 4, 5–7 (Mr. Justice Goldberg, in chambers).[5]

The congressional purpose of the Expediting Act is to facilitate review by this Court of civil antitrust suits brought by the United States, which were deemed by Congress to be of "great and general importance." 36 Cong. Rec. 1679 (remarks of Senator Fairbanks). Congress believed that "the delays inherent in allowing interlocutory appeals and review in two appellate courts" could be eliminated by limiting review to direct appeals from final judgments of the trial court. *United States* v. *FMC Corporation, supra*, 84 S. Ct. at 6. To permit interlocutory review in the courts of appeals would "impinge upon both aspects of the Expediting Act: the final review jurisdiction of the Supreme Court and expedition to the Supreme Court".

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[5] On September 30, 1971, the Seventh Circuit in *Fison Limited* v. *Hon. Joseph Sam Perry*, 69 C 1530, set down for oral argument the question whether Section 1292(b) is applicable to government antitrust cases.

United States v. *Cities Service Company*, 410 F. 2d 662, 664 (C.A. 1).[6]

3. Petitioner asserts that the language of Section 1292(b) gives the courts of appeals jurisdiction to review interlocutory orders in government civil antitrust cases, and that "nothing in the purpose or history of 1292(b) or of the Expediting Act precludes it" (Pet. 21). Petitioner does not dispute, however, that since *United States* v. *California Cooperative Canneries*, *supra*, this Court consistently has interpreted the Expediting Act as limiting appeal to final judgments. While the language of Section 1292(b) is silent on the question of interlocutory appeals in government civil antitrust cases, there is no indication in the statute's legislative history that Congress intended a partial repeal, *sub silencio*, of the Expediting Act's long recognized prohibition against interlocutory appeals.[7] Indeed, in 1962, four years after passage of

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[6] In recent years the United States has argued in the courts of appeals that Congress intended to preserve a single exception to the policy against interlocutory appeals in government civil antitrust cases, in favor of a right of appeal from the grant or denial of an interlocutory injunction. This claim, based primarily on the legislative history of the predecessor statute to the present 28 U.S.C. 1292(a)(1), generally has been rejected. See *United States* v. *Cities Service Co.*, 410 F.2d 662 (C.A. 1); *United States* v. *FMC Corp.*, 321 F.2d 534 (C.A. 9); but see *United States* v. *Ingersoll-Rand Co.*, 320 F.2d 509 (C.A. 3). In any event, there is no comparable basis for an argument in favor of interlocutory appeal to the courts of appeals from any other kind of order.

[7] The Senate Report on the legislation does indicate that Section 1292(b) was intended to apply to "antitrust cases" in

Section 1292(b), the Court reaffirmed the principle that the Expediting Act was intended to limit review in a civil antitrust suit brought by the government "to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree." *Brown Shoe Co., Inc.* v. *United States*, *supra*, 370 U.S. at 305, n. 9.[8]

Finally, petitioner argues that permitting interlocutory appeals in government civil antitrust cases would be "an enormous service to this Court in lightening its burden * * *" (Pet. 21). But even if this is so, it would not justify ignoring the limitation in the Expediting Act, which permits appeals only from final judgments and only to this Court. It would be anomalous for a court which is without jurisdiction to entertain an appeal from the final judgment to rule on a "controlling question of law"—the standard in the Interlocutory Appeals Act—which could control the outcome of the case. In view of the possible multiple appeals such a procedure would foster, the interlocutory review that petitioner seeks, far from expediting government civil antitrust cases, would only occasion delay and uncertainty in litigation. Even if such a marked and far-reaching modification of the

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at least one instance. S. Rep. No. 2434, 85th Cong., 2d Sess. 3. In context, however, the intended reference is to *private* antitrust suits, not subject to the Expediting Act.

[8] While petitioner correctly notes that the question of interlocutory appeal under Section 1292(b) was not before the Court in *Brown Shoe* (Pet. 19), the Court was fully aware of that section in making the quoted statement. See 370 U.S. at 306, n. 12.

Expediting Act is supportable on policy grounds, the modification can be made only by Congress. *United States* v. *Cities Service Company*, 410 F. 2d 662, 667–668 (C.A. 1).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfuly submitted.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The brief of the United States in opposition does not controvert—indeed, appears to concede—that to permit interlocutory appeals in a government civil antitrust case under 28 U.S.C. § 1292(b) would be "an enormous service to this Court in lightening its burden" (p. 8). It argues, however, that this "would not